

Exhibit 9

In re
CUSTOMS AND TAX ADMINISTRATION OF
THE KINGDOM OF DENMARK
(SKATTEFORVALTNINGEN) TAX REFUND
LITIGATION*

*This Report relates to all related dockets in *In re: Skat Tax Refund Scheme Litigation*, 1:18-md-2865.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No.18-MD-2865 (LAK)

Expert Report

of

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December 31, 2021

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I. Introduction

1. I have been retained on behalf of certain defendants in this case to provide expert testimony and expert reports analyzing and opining on issues related to the qualification of pension plans, the practices of the Internal Revenue Service ("IRS") as the agency with the authority to determine whether a pension plan is qualified under section 401(a) of the Internal Revenue Code ("IRC" or the "Code"), and the approach of the federal regulators in their oversight of pension plans.
2. My qualifications to testify as an expert are set out in Exhibit 1. As the information on that Exhibit indicates, I have been actively involved in the qualified plan community for over four decades and have extensive experience with the IRS (and other federal retirement plan regulators) on plan qualification matters, including audits and corrections. In that regard, I have received recognition from both the National Office of the IRS Tax Exempt and Government Entities (TE/GE) and the District Director of the Los Angeles IRS District office.
3. In addition, I served as chair and co-chair of the Government Affairs Committee of the American Society of Pension Professionals and Actuaries and, in that capacity, met regularly with senior IRS officials on issues related to pension plans and their qualified status.
4. As a part of my work, I regularly represent plan sponsors and service providers on issues related to plan qualification and IRS audits of plans and the correction of qualification defects in plans. Over the years, I have handled, overseen or consulted on approximately 300 IRS audits of qualified plans and the correction of qualification defects through IRS procedures in at least 200 plans. That experience has given me insight into the meaning and application of plan qualification standards and into how the IRS interprets and applies qualification requirements.
5. I have also served in professional associations as a liaison to the IRS on issues including the qualification of pension plans. I served as a co-chair of the Los Angeles IRS Benefits Conference for 10 years. The conference was jointly planned and conducted with employee plan officials from the Los Angeles IRS District. During the planning sessions, there were numerous meetings and

discussions with IRS personnel who have responsibilities related to plan qualification.

6. My compensation for services as an expert in this case is \$975 per hour for time in 2021 and \$1075 per hour for time in 2022. I am assisted by Joshua Waldbeser and his rate is \$720 per hour. Payment for my services does not depend in any way on my opinions expressed herein or the outcomes in this matter.
7. I have testified as an expert at trial and in depositions on employee plan matters. Within the past 4 years, I have testified as an expert at a deposition (on May 5, 2020) in the case of *CFA Institute v. American Society of Pension Professionals & Actuaries, et. al.*, Civ. No. 3:19-cv-00012-NKM-RSB (W.D. Va.).
8. Exhibit 2 is a list of publications that I have authored or co-authored in the past 10 years.
9. Exhibit 3 is a list of the documents that I considered in the course of preparing this report.
10. My opinions expressed in this report are based on information and materials available to me on the date of this report (which are listed on Exhibit 3) and on my decades of professional experience. I reserve the right to further develop the opinions in the report, based on additional information and materials that I may review in the future.

II. Factual Background and SKAT's Allegations

11. I provide the following discussion solely for the purpose of providing context for my opinions.
12. I understand that Plaintiff Skatteforvaltningen (SKAT), the Customs and Tax Administration of the Kingdom of Denmark, is “the agency responsible for assessing and collecting taxes in Denmark and issuing tax refunds to claimants under certain double taxation treaties between Denmark and other countries.”¹ I

¹ *In re: Skat Tax Refund Scheme Litigation*, 356 F.Supp.3d 300, 308 (S.D.N.Y. 2019) (hereinafter “Motion to Dismiss Opinion”). For purposes of this report, I accept that the Motion to Dismiss Opinion accurately

understand that the U.S.-Denmark tax treaty (the “Treaty”) “allows for a full refund of tax withheld on dividends paid by Danish companies” to certain U.S. pension plans.²

13. I understand that the defendants in this case include U.S. pension plans and their authorized representatives.³ I understand that SKAT alleges that defendants submitted tax refund applications to SKAT and thereby received tax refunds from SKAT.⁴

14. I understand that SKAT alleges that a requirement for obtaining benefits under the Treaty is that the U.S. pension plans have tax-qualified status under section 401(a) of the IRC.⁵

15. I understand that SKAT further alleges the plans “did not meet the criteria for a qualified pension plan set forth in section 401(a) of the Internal Revenue Code” and were “sham[s].”⁶

III. Purpose of Report

16. The purpose of this Report is to assist the fact-finder in its assessment of whether the defendant pension plans were proper plans within the meaning of the IRC and

describes the complaints and their allegations. I express no opinion as to the legal analysis or outcome of the Motion to Dismiss Opinion, nor do I adopt the characterization of facts as set forth in the Motion to Dismiss Opinion or SKAT’s complaints. See also Amended Complaint, *Skatteforvaltningen v. Roadcraft Technologies LLC Roth 401(K) Plan, et. al.*, Civ. Action No. 19-cv-01812, ECF No. 62, (S.D.N.Y. Apr. 21, 2020) (“Roadcraft Am. Compl.”) ¶ 16.

² Roadcraft Am. Compl. ¶ 27.

³ Motion to Dismiss Opinion at 308; Roadcraft Am. Compl. ¶¶ 17-18.

⁴ E.g., Roadcraft Am. Compl. ¶¶ 42, 50.

⁵ Roadcraft Am. Compl. ¶ 27. I am not an international tax lawyer, have not read the Treaty, and express no opinion as to whether a plan must be tax-qualified under the IRC to qualify as a “plan” under the Treaty.

⁶ E.g., Roadcraft Am. Compl. ¶¶ 44, 68, see also *id.* ¶ 45.

not “shams” by providing insight into the IRS’s practices with respect to the determination of whether a pension plan is qualified and its ongoing oversight of qualified pension plans.

IV. One-Person Plans Are Commonly Used

17. Qualified pension plans can be adopted and maintained by a wide range of plan sponsors, including private companies, professional firms, governments, and tax exempt entities. Those plan sponsors can be sole proprietorships, partnerships, LLCs and LLPs, corporations, and other entities.

18. The IRC does not have any size requirements or limits for sponsors of U.S pension plans. U.S. pension plans can be sponsored by very large companies and by very small companies, including companies with only a single employee or owner-employee.⁷ The tax qualification rules, as applied by the IRS, govern the qualification of all plans, regardless of size.

19. Pension plans sponsored by one-person companies are often referred to as “one-person” or “one-participant” plans.

20. One-person plans can—like all U.S. pension plans—be tax qualified under the IRC. That includes one-person 401(k) plans like some of the plans at issue in this case. These one-person pension plans, commonly referred to as “Solo 401(k) plans,” are subject to the same qualification requirements as larger plans, but are not governed by the Employee Retirement Income Security Act (ERISA).

⁷ See IRS website: [Choosing a Retirement Plan: Profit-Sharing Plan | Internal Revenue Service \(irs.gov\)](https://www.irs.gov/retirement-plans/choosing-a-retirement-plan-profit-sharing-plan); [One Participant 401k Plans | Internal Revenue Service \(irs.gov\)](https://www.irs.gov/retirement-plans/one-participant-401k-plans) (last visited December 31, 2021).

21. One-person 401(k) plans are fairly common, to the point that they are specifically recognized on an IRS employee plans web page.⁸ That IRS page begins with the following language:

A one-participant 401(k) plan is sometimes called a

- *Solo 401(k)*
- *Solo-k*
- *Uni-k*
- *One-participant k*

*The one-participant 401(k) plan isn't a new type of 401(k) plan. It's a traditional 401(k) plan covering a business owner with no employees, or that person and his or her spouse. These plans have the same rules and requirements as any other 401(k) plan.*⁹

22. Over the years, I have represented hundreds of small plans, both in providing advice directly to the plans and in representing those plans in IRS audits. In addition, I have been active in the American Society of Pension Professionals and Actuaries (ASPPA, a trade organization with many members who administer small plans) and have had extensive conversations with many of those members. I also have represented a number of administrative firms who provide services to small plans. In my experience (which, as described, includes small plans—such as one-person 401(k) plans) very small plans, such as one-person plans, often invest in a broader range of investments than do larger 401(k) plans. That is at least partially because small plans may be investing only the accounts of the owners of the plan sponsors. In that scenario, the plans may be willing to pursue less traditional investment strategies. That is largely because, in one-person plans, the plan investments are in the sole participant's account and are managed by that participant, while larger plans invest more traditionally because the participants

⁸ See IRS website: [One Participant 401k Plans | Internal Revenue Service \(irs.gov\)](https://www.irs.gov/retirement-plans/one-participant-401k-plans) (last visited December 31, 2021).

⁹ *Id.*

can number in the thousands or tens of thousands and their retirement security depends on the assets being invested with risk as a consideration.

V. The IRS Monitors and Enforces Plan Qualification Requirements

23. The IRS is the federal agency with authority and responsibility to determine the initial and ongoing tax qualification of pension plans, including one-person 401(k) plans.¹⁰

24. In that regard, to be considered tax-qualified under the IRC, pension plans need to be “qualified” in two different ways: “form” and “operation.”

25. To be qualified as to “form”, the plan documents must contain certain requirements set forth in the IRC, as determined by the IRS.

25.1. The IRS offers pension plan sponsors the option to submit the plan document to the IRS for review. The IRS will then review the plan document and determine if the plan is qualified in its form, in which case the IRS will issue a letter affirming that determination. Only the IRS can make that determination and issue such a letter.

25.2 Certain entities known as “volume submitters” may submit a plan for pre-approval by the IRS. The IRS will then review the plan document and determine if the plan is qualified in its form, in which case the IRS will issue a letter affirming that determination. Once the plan is determined to be qualified in its form, it is a “pre-approved plan,” and sponsoring entities may adopt the pre-approved plan and rely on the determination letter issued to the volume submitter as if it were issued to their plans. The IRS offers this service to

¹⁰ See, e.g., [401k Resource Guide Plan Sponsors What if You are Audited | Internal Revenue Service \(irs.gov\)](#) (last visited December 31, 2021) (“The IRS has primary jurisdiction over the qualified status of 401(k) plans, which includes examining plans and processing requests for determination letters.”).

increase efficiency (for example, to substantially reduce the number of plan documents that the IRS has to review) and to reduce cost (since the service provider can submit one document that can then be used by many plan sponsors).

25.3. Alternatively, the plan sponsor can opt not to submit the plan document for IRS review or not to use a pre-approved plan document. This decision does not impact the plan's qualification; rather, it means only that the plan is operating without having received affirmation from the IRS that the form of the plan is proper.

25.4. If the documents establishing a plan satisfy the requirements for a qualified plan (regardless of whether the IRS reviews and approves the plan documents or whether a pre-approved plan is used), the plan is a qualified plan.

26. The second way in which plans are qualified is "in operation." That is, a plan must be operated in accordance with the qualification requirements in the IRC as reflected in the provisions of the plan document. However, not all Code requirements are qualification requirements, as discussed further *infra* at ¶¶ 28 and 52-53.

27. The IRS audits thousands of qualified plans each year. As stated *supra* at ¶ 4, I have handled, overseen or consulted on approximately 300 IRS audits of qualified plans. Based on my experience in this regard, I am familiar with what an IRS audit of a qualified plan ordinarily entails, the processes the IRS undertakes to review whether a plan has been operated in a qualified manner, and the possible outcomes upon the conclusion of the audit.

28. The IRS typically initiates a plan audit with a letter requesting information both about the plan's qualification as to form and as to its operational compliance. After receiving that information, the IRS reviews the information to determine if the plan

documents have been previously approved by the IRS (including any changes after the initial determination) and to determine if the plan has been operated in accordance with its provisions and certain other operational requirements. Usually, the IRS determines that, based on the initial review, additional documents are needed. Those documents are then requested and reviewed. If, after a review of the plan's operational information, the IRS determines that there are violations of the qualification standards, the IRS will usually seek correction of the operational issues. In that case, if the issue is corrected, the plan will continue to maintain its qualified status. If, in the review, the IRS finds prohibited transactions,¹¹ it will require that the transactions be reversed and corrected and that a tax be paid, but the plan will not be disqualified. On the other hand, if the IRS does not find any defects as to form or operation, it will issue a "no change" letter, which means that no remedial steps are required and the plan remains a qualified plan.

29. After performing an audit, the IRS can (but rarely does) "disqualify" a plan. Instead of disqualifying a plan, the IRS may allow plan sponsors to correct any defects through an IRS program called the Employee Plans Compliance Resolution System (EPCRS).¹²

30. The IRS is the federal agency that has the authority to determine if a plan is qualified and to determine if a plan should be disqualified.¹³

¹¹ Prohibited transactions are specified transactions (in section 4975 of the IRC) between a qualified plan and a "disqualified person". These limitations are not qualification standards and have remedies separate from disqualification. See, e.g., [Retirement Topics - Prohibited Transactions | Internal Revenue Service \(irs.gov\)](#) (last visited December 31, 2021).

¹² See <https://www.irs.gov/retirement-plans/epcrs-overview> (last visited December 31, 2021).

¹³ See *supra* ¶ 23 & n.10.

31. If a plan is qualified as to form, and is operated in accordance with the qualification requirements in the IRC as administered by the IRS, it continues to be qualified until and unless the IRS determines that it is not qualified.
32. In other words, the qualification of a plan is based on the satisfaction of specific and detailed rules, and not on a general or vague concept of propriety based on its investments, strategies or other purposes.
33. In addition, a qualified plan can be funded in different ways. For example, common methods of funding qualified plans include plan sponsor contributions, participant deferrals, and transfers from other qualified plans (which are referred to as rollovers).
34. The IRS imposes no criteria for the proper formation of a qualified plan other than the requirements of the Code.
35. Based on my experience, the IRS would not disqualify or otherwise take action where a recently-formed LLC sponsors a pension plan formed for the purpose of engaging in a specific investment strategy, so long as the plan is formed and operated in accordance with the qualification requirements in the IRC.

VI. The RJM, Roadcraft, and AIG Plans Are Tax-Qualified and Are Not “Shams”

A. Properly Formed and Operated One-Person Plans Are Not “Shams”

36. While one-person plans may have investment strategies that reflect the investment preferences of the individual participant, and as a result may not resemble the investment strategies of larger retirement plans, that does not mean that such a small plan is not qualified. From an IRS perspective, and for purposes of initial and ongoing qualification, the investment strategy pursued by qualified plans in this case (or other investment strategies utilizing atypical third-party investments) would not cause a plan to be considered a sham or not a proper plan. In fact,

neither of those terms or concepts appears in the Code requirements for qualified plans and, in my experience, I have not seen the IRS assert that a plan's qualified status should be ignored or revoked based on such concepts.

37. To the contrary, it is my opinion based on my experience that small, one-person qualified plans do invest differently than larger plans and that, nonetheless, they are qualified when formed and operated in accordance with the qualification rules as applied by the IRS.

B. The RJM, Roadcraft, and AIG Plans Were Formed as Qualified Plans

38. I have reviewed the plan documents and IRS opinion letters (i.e. letters affirming that plans are qualified in form) for the RJM Capital LLC Pension Plan ("RJM Plan") and Roadcraft Technologies LLC Roth 401(k) Plan ("Roadcraft Plan"). The plan documents for both entities have received favorable opinion letters from the IRS, establishing their qualified status as to form.¹⁴

39. The plan documents provide that 401(k) deferrals can be made to the plan; stated differently, the plans are qualified 401(k) plans.

40. I have also reviewed the plan documents and IRS opinion letter for the American Investment Group of New York, L.P. Pension Plan ("AIG Plan"). This plan was not based on a pre-approved volume submitter plan like the RJM and Roadcraft Plans, but instead received an individual determination letter from the IRS that the plan was qualified as to form.¹⁵

¹⁴ Both plans relied on a pre-approved plan for which a volume submitter had obtained a determination letter, as described *supra* ¶ 25.2. See Response to IRS' March 21, 2018 Request for Information - May 8, 2018, WH_MDL_00356191; Letter of March 9, 2016 from Elite Pension Consultants to Roadcraft Technologies LLC, with enclosed copy of IRS approval letter, WH_MDL_00139333-4.

¹⁵ See Letter from Internal Revenue Service to American Investment Group of New York LP - January 14, 2003, ACER_00015174.

41. In addition, the RJM Plan was audited by the IRS.

42. The audit was extensive and lasted for almost two years.¹⁶ Although the audit was for the plan year ending December 31, 2016,¹⁷ it is my understanding that the IRS requested—and the Plan provided—historical data for the RJM Plan, the sponsoring LLC, and other plans and LLCs at issue in this litigation. It is my understanding that this data included, among other things, plan documentation, plan financial information, plan contributions, transfers, and information about the sponsoring LLC, and included information regarding the Avanix Management LLC Roth 401(k) Plan, Batavia Capital Pension Plan, Battu Holdings LLC Roth 401(k) Plan, Calypso Investments LLC Pension Plan, Cavus Systems LLC Roth 401(k) Plan, Crucible Ventures LLC Roth 401(k) Plan, Hadron Industries LLC Roth 401(k) Plan, Limelight Global Productions LLC Roth 401(k) Plan, Michelle Investments LLC Pension Plan, Monomer Industries LLC Roth 401(k) Plan, Plumrose Industries LLC Roth 401(k) Plan, Remece Investments LLC Pension Plan, Routt Capital LLC Solo 401(k) Plan, f/k/a Routt Capital Pension Plan and Trust, True Wind Investments LLC Roth 401(k) Plan, and Xiphias LLC Pension Plan.¹⁸

43. At the completion of the audit, the IRS issued a “no change” letter. The issuance of a “no change” letter means that the IRS did not find any qualification defects in the form or operation of the plan. As described *supra* at ¶ 28, this means that no remedial steps are required and the plan remains a qualified plan.

¹⁶ See Letter from IRS re Acceptance of Return - February 3, 2020, WH_MDL_00358607.

¹⁷ Response to IRS' March 21, 2018 Request for Information - May 8, 2018, WH_MDL_00356182.

¹⁸ See, e.g., Letter from IRS regarding Request for Information - May 22, 2018, WH_MDL_00356591-93; Response to IRS' May 22, 2018 Request for Information - June 26, 2018, WH_MDL_00356595-96; Response to IRS' February 4, 2019 Request for Documents - February 25, 2019, WH_MDL_00357014-18.

44. I am not aware of any reason that, had the IRS undertaken an audit of any other plans with arrangements similar to the RJM Plan, it would not have issued a “no change” letter similar to the one issued with respect to the RJM Plan.

44.1. For example, based on the documents that I have reviewed, the Roadcraft Plan arrangement was similar to the RJM Plan, and so I am not aware of any reason why the IRS would not have issued a similar “no change” letter had it conducted an audit of the Roadcraft Plan.

44.2. I am also not aware of any reason why the IRS would not have issued a “no change” letter had it conducted an audit of the AIG Plan.

45. Accordingly, the plans that I reviewed are tax qualified as to form (as evidenced by their favorable IRS opinion and determination letters) and I have not seen any evidence that they were operated in a manner that would adversely affect the plans’ qualification. Indeed, the RJM Plan was audited by the IRS and received a “no change” letter, meaning that no remedial steps were required and the RJM Plan remained a qualified plan. Had the IRS examined other defendant pension plans that were formed and operated similarly to the RJM Plan, I am not aware of any reason that it would not have issued “no change” letters similar to the one issued with respect to the RJM Plan.

C. The Qualified Status of the RJM, Roadcraft, and AIG Plans, And Other Similarly-Situated Defendant Plans, Would Not be Lost by Engaging in the Investment Strategies At Issue in This Case

46. The plan and trust¹⁹ documents for the RJM, Roadcraft, and AIG Plans, which were approved by the IRS (as evidenced by their opinion letters), include very

¹⁹ The assets of qualified retirement plans are commonly held in a trust established in the plan document or in a separate related document. The provisions of a retirement plan trust include the powers of the trustee (including investment powers) and, if participant-directed, the range of investments available to the participant. The investment provisions of most retirement plan trusts are usually very broad, including

broad investment provisions, permitting an unlimited range of investments. The specific language in the RJM Capital LLC trust is:

The assets purchased, acquired and retained by the Trustee for investment may include, but not by way of limitation, every kind of property, real, personal and mixed interests therein, specifically including, but not by way of limitation, government obligations, corporate obligations of every kind, preferred and common stocks (including the stock of a corporate Trustee), buy and sell call and put options, and limited partnership interests, all in a manner conforming with the then existing law.²⁰

47. Similarly, the Roadcraft Plan document has trust provisions that provided that the trustee had the following powers:

Invest and reinvest the Trust Fund in any property, real, personal, personal or mixed, wherever situated, and whether situated, and whether or not productive of income or consisting of wasting assets, including, without limitation, common and preferred stock, bonds, notes, debentures, options, mutual funds, leaseholds, mortgages (including without limitation, any collective or part interest in any bond and mortgage or note and mortgage), certificates of deposit, and oil, mineral or gas properties, royalties, interests or rights (including equipment pertaining thereto), without being limited to the classes of property in which trustees are authorized by law or any rule of court to invest trust

almost all possible investments. The trust provisions are reviewed by the IRS as a part of the qualification process.

²⁰ Trust Agreement under the RJM Capital Pension Plan, SKAT_MDL_00000356.

*funds and without regard to the proportion any such property may bear to the entire amount of the Trust Fund;....*²¹

48. The qualified pension plan document for the AIG Plan also includes similar broad investment powers in its trust provisions:

*The Trustee may invest assets in any form of property, including common and preferred stocks, exchange covered call options, bonds, money market instruments, mutual funds, saving accounts, certificates of deposit, Treasury bills, insurance policies and contracts, or in any other property, real or personal, foreign or domestic, having a ready market including securities issued by an institutional Trustee and/or affiliate of such Trustee. An institutional Trustee may invest in its own deposits if they bear a reasonable interest rate. The Trustee may retain, manage, operate, repair, improve and mortgage or lease for any period on such terms as it deems proper any real estate or personal property held by the Trustee, including the power to demolish any building or other improvements in whole or part. The Trustee may erect buildings or other improvements, make leases that extend beyond the term of this Trust, and foreclose, extend, renew, assign, release or partially release and discharge mortgages or other liens.*²²

49. This broad range of permissible investments is consistent with my experience that small plans, and in particular one-person plans, tend to invest in a broader range of investments than larger 401(k) plans. As explained *supra* at ¶ 22, this is likely at least partially due to the fact that small plans may be investing only the accounts of the owners of the plan sponsors, who are also the sole participants. In that scenario, the plans may be more willing to invest in less traditional manners.

²¹ Roadcraft Technologies LLC Roth 401(k) Plan, WH_MDL_00139411-12.

²² American Investment Group of New York, L.P. Pension Plan - October 29, 2002, AIG_00000411; American Investment Group of New York, L.P. Pension Plan - January 22, 2010, AIG_00000494.

50. There is nothing in the plan documents, or anything in my experience, that would lead me to believe that the IRS would disqualify the plans for engaging in the investment strategy at issue in this case. Indeed, the trust provisions (which, as discussed above, the IRS reviewed and determined to conform to IRC qualification requirements) specifically contemplate that the plans may invest in almost anything, including securities, options, partnership interests, and “every kind of property.”

51. In addition, in the materials provided to me, I did not see any indication of any other operational activities that would cause the disqualification of the plans.

52. I understand that SKAT contends that certain defendant pension plans, including the RJM and Roadcraft Plans, violated an “exclusive benefit requirement” under the IRC because they “transferred” the “majority” of the dividend withholding tax refunds they “received from SKAT” to third parties.²³ Assuming, only for the purposes of this discussion, that the IRS had examined these plans and drawn the conclusions that SKAT alleges to be true, based on my experience, the payment of substantial fees to a third-party investment or service provider by a defendant pension plan would not lead the IRS to disqualify those plans in the event of an IRS audit of the plans.

52.1. I have never seen the IRS assert a qualification violation for payments of fees to unrelated third parties. In fact, in my active involvement in industry organizations, committees, and conferences, I have never heard of such a claim being asserted by the IRS.

²³ Plaintiff Skatteforvaltningen’s Responses and Objections to Defendants’ First Set of Interrogatories to Plaintiff Skatteforvaltningen, July 15, 2021 (“Interrogatory Responses”) at 7.

52.2. Instead, where the IRS believes that unreasonably high compensation has been paid to an unrelated third party, the resulting assertion, if any, would be that a prohibited transaction had occurred.²⁴

52.3. When the IRS finds a prohibited transaction, the remedy is that the recipient of the funds (i.e. an unrelated third party that the IRS believes received unreasonably high compensation) is required to restore the excess amounts to the plan and pay a tax on the excess amount. The remedy would not be a disqualification of the plan.

53. I understand that SKAT contends that certain defendant pension plans, including the RJM and Roadcraft Plans, violated an “exclusive benefit requirement” under the IRC because they “entered partnership agreements through which they paid to their partners 90% to 95% of the [dividend withholding tax] refund amounts” remaining after payments to third parties.²⁵ Assuming, only for the purposes of this discussion, that the IRS had examined these plans and drawn the conclusions that SKAT alleges to be true, based on my experience, defendant pension plans’ participation in partnership agreements with other qualified plans, where the profits are allocated in proportion to capital contributions, would not cause the IRS to conclude that a qualified retirement plan was no longer qualified under the exclusive benefit requirement.

53.1. I have worked with a number qualified plans that participated in partnerships (and a number of partnerships themselves), and I have not seen the IRS challenge the practice of allocating partnership profits among qualified plan investors in proportion to capital contributions, subject to reduction for an

²⁴ For a description of prohibited transactions in a qualified plan, see *supra* ¶ 28 & n.11.

²⁵ Interrogatory Responses at 7.

unrelated general partner's or manager's profit share, as violating the exclusive benefit rule.

53.2. Similarly, I have not heard of any such challenges in my participation in industry meetings or conferences. Based on my experience in working with the Department of Labor, I have not seen challenges to the propriety of allocating profits (after expenses) in proportion to capital contributions.

53.3 Even if the IRS were to determine that allocation of profits in a partnership deviated from the capital contributions, and the benefit of that allocation was derived by a party in whom the plan, or its fiduciary or sponsor, did not have an economic or personal interest, the amount so allocated would be viewed as a prohibited transaction. The plan would not lose its qualified status.

54. I understand that SKAT contends that certain defendant pension plans, including the RJM and Roadcraft Plans, violated a "permanency requirement" under the IRC because they "were formed solely for the purpose of submitting refund applications to SKAT."²⁶ Assuming, only for the purposes of this discussion, that the IRS had examined these plans and drawn the conclusions that SKAT alleges to be true, based on my experience, the IRS would not disqualify as "not permanent" the RJM and Roadcraft Plans on this basis, so long as there was not an intent at the time of their formation to terminate the plans within a few years of establishment. For example, the IRS would not make such an assertion if the intended duration of the plans was indefinite.

54.1. In my experience, the IRS will typically probe into the reason for a plan termination only if both (i) the plan had not been in existence for at least five plan years and (ii) the plan sponsor does not have an acceptable reason for terminating the plan.

²⁶ Interrogatory Responses at 8.

54.2. I have never heard of the IRS disqualifying a plan on permanency grounds because the plan was formed to take advantage of a particular investment opportunity and terminated after that investment opportunity unexpectedly was no longer available.

55. I understand that SKAT contends that certain defendant pension plans, including the RJM and Roadcraft Plans, violated a “permanency requirement” under the IRC because they “have provided no evidence demonstrating that contributions were made to the Plans after SKAT stopped paying refund applications in August 2015,” and that therefore the plans did not make “recurring and substantial contributions” to the plans.²⁷ Assuming, only for the purposes of this discussion, that the IRS had examined these plans and drawn the conclusions that SKAT alleges to be true, based on my experience, if a qualified retirement plan is adopted through use of a plan document that satisfies the IRS requirements as to form and the plan is otherwise operated in accordance with the qualification requirements of the IRC, if a plan failed to make recurring and substantial contributions from the sponsor’s profits, the plan would not cease to be a qualified pension plan under the theory that it failed to satisfy the permanency requirement and would not cause the IRS to assert that the plan was not a qualified pension plan.

55.1. In my experience working with qualified plans, I have never seen the IRS assert a qualification violation for a failure of a 401(k) plan sponsor to make substantial and recurring contributions from profits. In fact, in my active involvement with industry organizations and committees, I have not heard of a 401(k) plan being disqualified for this reason.

55.2. Where the IRS believes that ongoing contributions to a 401(k) plan will not be made, it may require that participants’ accounts become immediately

²⁷ Interrogatory Responses at 8.

vested and non-forfeitable, which means that the accounts would be fully “owned” by the participants (that is, an account would not be forfeited if a participant left the plan sponsor). However, in my experience the IRS would not assert that the plan is not a qualified plan on the basis that it was not permanent. The full vesting of participants’ accounts under those circumstances has no impact on the tax-qualified status of the plan.

56. In sum, the plan documents, which were approved by the IRS, permitted a wide range of investment strategies, and I see no basis on which the IRS could conclude that the plans were disqualified by participating in a non-traditional investment strategy. In addition, in my review of the material provided to me, I did not see any indication of any other operational activities that would have caused the disqualification of the plans.

57. Further, to the extent that the other plans at issue in this case are situated similarly to the RJM Plan, the Roadcraft Plan, and the AIG Plan, the same conclusions and opinions would apply. That is, the plans are qualified as to form due to their adoption of plan documents with favorable IRS opinion or determination letters, and nothing in the facts that I have reviewed would indicate that the plans could have lost their qualified status in operation thereafter.

This Report is executed:

Date: December 31, 2021

C. Frederick Reish

Exhibit 1

Biographical Information on C. Frederick Reish

C. Frederick Reish has over 40 years of experience in working with qualified retirement plans and the Federal agencies that regulate and examine those plans.

His experience with qualified plans and their requirements for qualification is extensive. Mr. Reish has handled, overseen or consulted on over 300 audits by the Internal Revenue Service of qualified retirement plans. In addition, he has personally handled, overseen or consulted on several hundred qualification “corrections” where retirement plans were able to retain their qualified status by correcting defects in their plans. At least 200 hundred of the corrections of those plans were through a program where the correction of the plans was filed with the IRS and approved by the IRS.

He has received a number of awards for his contributions to benefits education, communication and service, including:

- Recipient of the IRS Director’s Award and the IRS Commissioner’s Award for his contributions to employee benefits education.
- Charter Fellow of the American College of Employee Benefits Counsel.
- Selection by *PLANADVISER* magazine as one of the 5 “Legends” of the retirement industry and with retirement advisers.
- The American Society of Pension Professionals & Actuaries (ASPPA)/Morningstar 401(k) Leadership Award for directly and positively influencing the ability of Americans to build successful retirements.
- Selection by *PLANSponsor* magazine as one of the 15 Legends in the development of retirement plans.
- Received Lifetime Achievement Awards from *PLANSponsor* magazine and from Institutional Investor for his contributions to the benefits community.

- Received the Eidson Founder's Award from ASPPA for his significant contributions to that organization and to the benefits community.

In addition, Mr. Reish has:

- Served as co-chair of the Los Angeles IRS Benefits Conference for over 10 years.
- Taught Pension and Profit Sharing at the Masters of Business Tax Program in the College of Business, School of Accounting, University of Southern California.
- Served as chair and co-chair of the Government Affairs Committee of the American Society of Pension Professionals & Actuaries, as well as serving on the Board of Directors of that organization.

He has represented ASPPA on issues with IRS audits and corrections, including development of the programs that the IRS uses for voluntary corrections and corrections where issues were found by the IRS during plan audits.

He is frequently quoted by both retirement industry publications and the general media, including The Wall Street Journal, Fortune, Forbes, Inc., CFO Magazine, New York Times, Washington Post, Los Angeles Times, USA Today, Institutional Investor, PLANSPONSOR, and Pensions & Investments.

In addition to being a partner at Faegre Drinker, Mr. Reish is sought after as an author and speaker on retirement plan issues.

Exhibit 2

Articles from December 2012 to December 2021

2021

Hartford Funds

January 26, 2021

"Mergers and Acquisitions: Checklist of 401(k) Considerations Before the Transaction"

Fred Reish

NAPA Net the Magazine

January 29, 2021

"The New E-Delivery Rule: The Price of Simplification"

Fred Reish, Bruce Ashton and Stephen Pennartz

PlanAdviser magazine

January/February 2021

"The Latest Word on ESG"

Fred Reish and Joan Neri

Faegre Drinker Insights

February 9, 2021

"SECURE Act 2.0: Key Provisions Affecting Retirement Plans"

Fred Reish, Bruce Ashton and Steve Pennartz

Hartford Funds

February 10, 2021

"Plan Sponsor Considerations Where A Recordkeeper Is Sold"

Fred Reish

Faegre Drinker Insights

February 22, 2021

"FINRA's Focus on Variable Annuity Switches Continues"

Fred Reish, Bruce Ashton, Sandy Grannum, Jim Lundy, David Porteous and Edward Scarillo

Hartford Funds

March 2, 2021

"The DOL's New Fiduciary Rule: Changes for Rollover Recommendations and Advice to IRAs"

Fred Reish

Faegre Drinker Insights

March 23, 2021

"Broker-Dealer Services to Plans and IRAs: Impact of the DOL Fiduciary Advice Exemption"

Fred Reish, Bruce Ashton and Josh Waldbeser

Hartford Funds

March 29, 2021

"The SEC's 2021 Examination Priorities for Individual Investors"

Fred Reish

PlanAdviser magazine

March/April 2021

"Lifetime Income Illustrations: Preparing Committees for This SECURE Act Requirement"

Fred Reish and Joan Neri

Lazard Asset Management

April 2021

"How 401(k) Committees Can Maximize Results and Minimize Risk"

Fred Reish

Lazard Asset Management

April 2021

"DC Rising: Illuminating Lessons: Lesson Learned"

Fred Reish

Faegre Drinker Insights

April 7, 2021

"Fred Reish Summarizes Expected SECURE Act 2.0 Provisions for Bloomberg Law"

Fred Reish

Hartford Funds

May 11, 2021

"Fiduciary Considerations for Offering Managed Accounts to Participants"

Fred Reish

PlanAdviser magazine

May/June 2021

"Rollovers and Fiduciaries: Recent DOL Guidance Expands the Definition of Fiduciary Advice"

Fred Reish and Joan Neri

Faegre Drinker Insights

June 2021

"Real Estate in Participant-Directed Defined Contribution Plans: Fiduciary Considerations"

Fred Reish and Bruce Ashton

Hartford Funds

June 11, 2021

"The DOL Speaks: Cybersecurity is a Fiduciary Responsibility"

Fred Reish

Hartford Funds

June 29, 2021

"Best Practices and Risk Mitigation for Drafting 401(k) Investment Policy Statements"

Fred Reish

Faegre Drinker Insights

July 2, 2021

“Retirement Account Rollovers: PTE 2020-02 vs. PTE 84-24”
Fred Reish

PlanAdviser magazine
July/August 2021
“Now a Fiduciary: A Prudent Process for Rollover Advice”
Fred Reish and Joan Neri

Faegre Drinker Insights
August 2021
“Heavy Weather for Compliance: Best Practices in Response to DOL PTE 2020-02”
Fred Reish

Hartford Funds
August 11, 2021
“A Prudent Process and the Role of Committee Agendas”
Fred Reish

Hartford Funds
August 20, 2021
“What Practices Affect Fiduciary Liability Insurance?”
Fred Reish

Financial Planning Association
September 2021
“Retirement Account Rollovers: How to Comply With the DOL’s New Fiduciary ‘Rule’”
Fred Reish, Bruce Ashton, and Stephen Pennartz

Hub International
September 2, 2021
“Cybersecurity and Retirement Plans: Guidance, Investigations and Litigation”
Fred Reish

Faegre Drinker Insights
September 8, 2021
“Forced Rollovers of Small Retirement Account Balances: What to Do with Missing Participants”
Fred Reish and Stephen Pennartz

PlanAdviser magazine
September/October 2021
“Cybersecurity Considerations: How to Select and Monitor Recordkeepers”
Fred Reish and Joan Neri

Lazard Asset Management
October 2021
“DC Rising: The DOL Speaks on ESG Factor Investing”
Fred Reish

Faegre Drinker Insights
October 6, 2021

“The New DOL Fiduciary ‘Rule’ For Investment Advisers and Broker-Dealers and the December 20 Deadline: The Time to Act is Now”
Fred Reish and Bruce Ashton

Hartford Funds
October 11, 2021
“Dynamic QDIAs—An Alternative to Target Date Funds”
Fred Reish

JD Supra
October 18, 2021
“Department of Labor Proposal Would Encourage Consideration of ESG Factors for Plan Investments”
Fred Reish and Josh Waldbeser

Hartford Funds
October 27, 2021
“Back Door Roths: A Close Call, but Not the End of the Story”
Fred Reish

Hub International
November 18, 2021
“Lessons Learned: How Plan Sponsors Can Successfully Navigate the Fiduciary Waters”
Fred Reish

JD Supra
November 18, 2021
“Lessons Learned from Recent Fiduciary Victories”
Fred Reish and Christopher Williams

Hub International
December 2021
“Why a Plan Sponsor Won a Fiduciary Lawsuit”
Fred Reish

Hub International
December 1, 2021
“Fiduciary Breach for 401(k) and 403(b) Plans: Claims and Myths”
Fred Reish

2020

PlanAdviser magazine
January/February 2020
“Asset Allocation Models: A model’s structure determines the adviser’s fiduciary status”
Fred Reish and Joan Neri

White Paper
February 2020

"Fiduciary protection and other benefits of risk-based strategies in a defined contribution plan investment menu"
Fred Reish

Faegre Drinker Insights
February 3, 2020

"The SEC Trading and Markets Reg BI FAQ and the SEC's and FINRA's Plans for Reg BI Exams"
Fred Reish, Jim Lundy, Sandy Grannum, Josh Deringer, Brad Campbell, David Williams

Faegre Drinker insights
February 4, 2020

"Fred Reish Discusses Steps for Creating an Effective IPS with PlanSponsor"
Fred Reish

Faegre Drinker Insights
February 13, 2020

"The SEC Trading and Markets Reg BI FAQ and the SEC's and FINRA's Plans for Reg BI Exams"
Fred Reish, Jim Lundy, Sandy Grannum, Josh Deringer, Brad Campbell and
David Williams

PlanAdviser magazine
Feb 25, 2020
"Asset Allocations Models"
Fred Reish and Joan Neri

Hartford Funds
March 27, 2020
"Helping 401(k) Plan Sponsors in the Market Downturn"
Fred Reish

PlanAdviser magazine
March/April 2020
New Obligation to the SEC: Client relationship summaries will be needed to do rollovers
Fred Reish and Joan Neri

NAPA Net the Magazine
Spring 2020
"Guaranteed Retirement Income: The Impact of the Secure Act"
Fred Reish and Bruce Ashton

Faegre Drinker Insights
April 10, 2020
"SEC Issues Exam Guidance and New FAQs for Form CRS Compliance"
Fred Reish, Jim Lundy, Bruce Ashton, Sandy Grannum, Josh Waldbeser, Josh Deringer, and
David Porteous

Faegre Drinker Insights
April 13, 2020
"SEC Exam Guidance for Reg BI Compliance"

Fred Reish, Jim Lundy, Bruce Ashton, Sandy Grannum, Josh Waldbeser, Josh Deringer, and David Porteous

Hartford Funds
April 14, 2020
“Questions and Answers”
Fred Reish

White Paper
May 2020
“Offering a Brokerage Window: A discussion of the fiduciary considerations”
Fred Reish and Bruce Ashton

White Paper
May 2020
“Fiduciary Resource Handbook”
Fred Reish and Bruce Ashton

PlanAdviser magazine
May/June 2020
“Client Relationship Summary: Who Exactly Needs to Receive a Form CRS?”
Fred Reish and Joan Neri

Hartford Funds
June 11, 2020
“Plan Sponsors Are Being Sued for Recordkeeper Use of Participant Data”
Fred Reish

Faegre Drinker Insights
June 23, 2020
“Department of Labor Publishes Request for Information on Pooled Employer Plans”
Fred Reish Bruce Ashton and Josh Waldbeser

Hartford Funds
June 26, 2020
“Projections of Retirement Income: Under the SECURE Act: Opportunities for Advisors”
Fred Reish

Invesco
July 2020
“Heightened Fiduciary Protection – Elevate your plan with the added benefits of risk-based strategies”
Fred Reish

Hartford Funds
July 23, 2020
“The DOL’s Proposal to Allow Conflicted Advice to Plans, Participants and IRAs”
Fred Reish

PlanAdviser magazine

July/August 2020

"DOL Gives Private Equity Guidance: 401(k) plans may include the strategy as part of a diversified fund"

Fred Reish and Joan Neri

Hartford Funds

September 2, 2020

"Pooled Employer Plans: Coming to You on January 1"

Fred Reish

Hartford Funds

October 12, 2020

"The Fiduciary Responsibility for Self-Directed Brokerage Accounts in 401(k) Plans"

Fred Reish

Hartford Funds

October 29, 2020

"Fiduciary Advice by the Numbers: 3(21) and 3(38)"

Fred Reish

Hartford Funds

November 13, 2020

"Post-Election Analysis: What's Next for Retirement Policy"

Fred Reish

PlanAdviser magazine

November/December 2020

"The DOL's Latest Proposed PTE: How advisers who only do rollovers would avoid prohibited transactions"

Fred Reish and Joan Neri

Invesco

December 2020

"The Road to Retirement – Now is the Time to Prepare for Lifetime Income Illustrations"

Fred Reish

Hub International

December 2, 2020

"Cybertheft of Participants Accounts: A Fiduciary Responsibility?"

Fred Reish

Hub International

December 2, 2020

"The Risk of Mining Employee Data To Guide Financial Wellness Programs"

Fred Reish

Hub International

December 2, 2020

"ERISA Litigation: The Biggest Risks for Fiduciaries"

Fred Reish

2019

Faegre Drinker Insights

January 31, 2019

“FINRA’s 529 Plan Share Class Initiative to Self-Report”

Fred Reish, Sandy Grannum, Jim Lundy, Matthew Silver and Jamie Helman

Hartford Funds

February 19, 2019

“Bad Lessons to be Avoided by Plan Committees”

Fred Reish

Hartford Funds

February 19, 2019

“Good Lessons for Plan Committees”

Fred Reish

Hartford Funds

February 19, 2019

“What Do Judges and Plaintiffs’ Attorneys Focus on . . . in ERISA Litigation?”

Fred Reish

ASPPA Plan Consultant

February 7, 2019

“TIPS for TPAs: MEPs: Compensating the Sponsor”

Fred Reish, Bruce Ashton and Josh Waldbeser

PlanAdviser magazine

February 15, 2019

“ ‘Reg BI’ and Dual Registrants”

Fred Reish and Joan Neri

White Paper

April 2019

“Key fiduciary considerations when selecting guaranteed products”

Fred Reish and Bruce Ashton

Faegre Drinker Insights

April 2019

“TIPS for TPAs: MEPs: Compensating the Sponsor, Part II”

Fred Reish, Bruce Ashton and Josh Waldbeser

PlanAdviser magazine

April 15, 2019

“Are Personal Advisers ERISA Fiduciaries?”

Fred Reish and Joan Neri

Faegre Drinker Insights

May 29, 2019

"The SEC's Reg BI Package: Time to Vote"

Fred Reish, Josh Deringer, Sandy Grannum and Jim Lundy

Hartford Funds

June 4, 2019

"Legislation with Significant Retirement Plan Provisions Moving Through Congress"

Fred Reish

Hartford Funds

June 4, 2019

"Other Provisions of Interest"

Fred Reish

Hartford Funds

June 4, 2019

"Provisions Increasing Plan Coverage"

Fred Reish

Hartford Funds

June 4, 2019

"Provisions Improving Benefit Adequacy and Retirement Income"

Fred Reish

Faegre Drinker Insights

June 11, 2019

"What We Can Learn from the Anthem Settlement"

Fred Reish, Bruce Ashton, Jim Jorden and Wally Pflepsen

Faegre Drinker Insights

June 12, 2019

"The Final Reg BI Package: What to Know and What's Next"

Fred Reish, Jim Lundy, Josh Deringer and Sandy Grannum

PlanAdviser magazine

June 15, 2019

"The Cost of Advising One's Own Plan"

Fred Reish and Joan Neri

Faegre Drinker Insights

August 12, 2019

"DOL's Final Rule on Association Retirement Plans: What It Means for the Retirement Industry"

Fred Reish, Bruce Ashton and Josh Waldbeser

PlanAdviser magazine

August 16, 2019

"The SEC's Standard on IRA Rollovers"

Fred Reish and Joan Neri

The National Law Review

August 19, 2019

"REG BI, FORM CRS: The TARDIS of Disclosure Requirements"

Fred Reish, Sandy Grannum, Brad Campbell, Jim Lundy and Josh Deringer

Faegre Drinker Insights

September 8, 2019

"Forced Rollovers of Small Retirement Account Balances: What to Do with Missing Participants"

Fred Reish and Stephen Pennartz

Hartford Funds

September 24, 2019

"Auto-Porting 401(k) Account Balances"

Fred Reish

Hartford Funds

September 24, 2019

"The SEC's Reg BI 'Package' and its Impact on Investment Advisers"

Fred Reish

Hartford Funds

September 24, 2019

"Lessons for Advisors from ERISA Litigation"

Fred Reish

PlanAdviser magazine

September/October 2019

"An IPS 'Sets' The Standard"

Fred Reish and Joan Neri

Faegre Drinker Insights

October 2019

"Digging into the SEC's Final RIA Guidance – And Why It Repeatedly Uses the Term 'Best Interest'"

Fred Reish, James G. Lundy, Sandy Grannum, Joshua B. Deringer, Bradford P. Campbell and David L. Williams

InvestmentNews

October 8, 2019

"The Risks of Giving Advice to 401(k) Participants"

Fred Reish

PlanAdviser magazine

November/December 2019

"How to Protect Participant Data"

Fred Reish and Joan Neri

Invesco Shifting DC Times Magazine

December 2019

"Plan Governance - Data on Trial"

Fred Reish

Hartford Funds

December 23, 2019

"The SEC's New Form CRS/ADV Part 3: New Disclosures Coming Your Way"

Fred Reish

Hartford Funds

December 23, 2019

"Rollover Education and Its Role in Helping Participants"

Fred Reish

Hartford Funds

December 23, 2019

"The SEC Says that Rollover Recommendations Must Be in the Best Interest of the Participants: What That Means for Advisors"

Fred Reish

2018

Faegre Drinker Insights

January 11, 2018

"New York Department of Financial Services Proposes Fiduciary Regulation"

Fred Reish, Brad Campbell, Sandy Grannum, Kate Villanueva, H. Michael Byrne, Stacy Louizos and Nolan Tully

White Paper

February 2018

"The Prudence Standard: Affiliated Products and Services"

Fred Reish and Bruce Ashton

PlanAdviser magazine

February 1, 2018

"Policies Under the Fiduciary Rule"

Fred Reish and Joan Neri

Law360

February 23, 2018

"Examining SEC's 2018 Exam Priorities"

Fred Reish, Jim Lundy, Sandy Grannum and Jamie Helman

Faegre Drinker Insights

March 20, 2018

"Fifth Circuit Vacates Fiduciary Rule"

Fred Reish, Bruce Ashton, Sandy Grannum, Brad Campbell, Josh Waldbeser and Joan Neri

White Paper

May 2018

"Guaranteed Lifetime Income in Participant-Directed Plans: The Need. The Fiduciary Considerations"

Fred Reish and Bruce Ashton

Invesco

Summer 2018

“Aim True – Fiduciary responsibility in managing target date funds”

Fred Reish

White Paper

June 2018

“The Empower Retirement Best Interest Recommendation Program: Structure and Compliance”

Fred Reish & Bruce Ashton

Faegre Drinker Insights

June 26, 2018

“TIPS for TPAs: TPAs as Fiduciaries . . . of Their Own Plans”

Fred Reish and Heather Abrigo

PlanAdviser magazine

July 18, 2018

“Rollover Recommendations: Suggesting an IRA May Still be Prohibited”

Fred Reish and Joan Neri

TD Ameritrade

July 2018

“2018 SEC Best Interest Proposals”

Fred Reish

White Paper

July 2018

“The SEC best interest proposals”

Fred Reish

PlanAdviser magazine

August 13, 2018

“Prohibited Transaction Relief: How the DOL’s Policy Affects ERISA Plans”

Fred Reish and Joan Neri

Invesco

Winter 2018

Plan Governance - Missing Participants: The Fiduciary Responsibility for Plan Sponsors

Fred Reish

White Paper

September 2018

“Using Unitized Managed Accounts in 401(k) Plans”

Fred Reish and Bruce Ashton

Investment News

September 24, 2018

“The Ins and Outs of Pairing a 401(k) Plan Match with Student Loan Repayment”

Fred Reish

White Paper
October 2018
“Inclusion of Real Estate in Defined Contribution Plans: Fiduciary Considerations”
Fred Reish and Bruce Ashton

PlanAdviser magazine
October 22, 2018
“Investigations Intensify: The Agency Homes in on Fee Arrangements”
Fred Reish and Joan Neri

PlanAdviser magazine
December 2018
“SEC on Rollovers: The Agency Says RIAs Are Fiduciaries”
Fred Reish and Joan Neri

Faegre Drinker Insights
December 5, 2018
“TIPS for TPAs: Missing Participants and Fiduciary Responsibilities: A Risk for TPAs”
Fred Reish and Heather Abrigo

2017

PlanAdviser magazine January/February 2017 “Aggregating A Client’s Assets”
Fred Reish and Joan Neri

White Paper
February 2017
“Assessing Provider Conflicts of Interest: Why Checking the Box is Not Enough” Fred Reish and
Bruce Ashton

White Paper
February 2017
“Using Re-enrollment to Improve Participant Investing and Provide Fiduciary Protections”
Fred Reish and Bruce Ashton

White Paper
February 2017
“Recommending An Investment Manager under the Fiduciary Rule”
Fred Reish and Summer Conley

Faegre Drinker Insights
February 7, 2017
“Status of the Fiduciary Rule”
Fred Reish, Bruce Ashton, Brad Campbell, Jamie Helman, Joan Neri and Elise Norcini

Faegre Drinker Insights
March 2, 2017
“DOL Proposes Delay of Fiduciary Rule Applicability Date” Fred Reish

Faegre Drinker Insights

March 14, 2017

"DOL Issues Temporary Enforcement Relief for Fiduciary Rule Non-Compliance" Fred Reish, Bruce Ashton, Brad Campbell, Sandra Grannum, Joan Neri, Elise Norcini, and Joshua Waldbeser

PlanAdviser magazine March/April 2017 "Varying Fees"

Fred Reish and Joan Neri

White Paper

April 2017

"Fiduciary Process in Evaluating In-Plan Guarantees" Fred Reish and Bruce Ashton

White Paper

April 2017

"Addressing Participant Retirement Income Risks Fred Reish and Bruce Ashton

Faegre Drinker Insights

April 6, 2017

"Fiduciary Rule Delayed – But It's Not Entirely What Was Expected"

Fred Reish, Bruce Ashton, Brad Campbell, Sandra Grannum, Joan Neri, Elise Norcini, and Joshua Waldbeser

White Paper

May 2017

"Affiliated Products and Services and the Fiduciary" Fred Reish, Bruce Ashton and Elise Norcini

PlanAdviser magazine

May/June 2017

"401(k) Rollovers to IRAs" Fred Reish and Joan Neri

White Paper

June 2017

"Reasonable Fees for Plans and IRAs" Fred Reish and Bruce Ashton

Faegre Drinker Insights

June 2, 2017

" 'Last Minute' Fiduciary Rule Check-In: What Independent RIA Firms Should Do Now"

Fred Reish, Joan Neri and Joshua Waldbeser

Faegre Drinker Insights

June 21, 2017

"Impact of the DOL Fiduciary Rule on Independent Insurance Agents"

Fred Reish, Bruce Ashton, Joan Neri and Joshua Waldbeser

White Paper

July 2017

"401(k) and 403(b) Plan Sponsors and Their Fiduciary Duties for Revenue Sharing"

Fred Reish

Faegre Drinker Insights

July 20, 2017

"Impact of the DOL Fiduciary Rule on Broker-Dealers: Recommending Annuities to IRA Investors"
Fred Reish, Bruce Ashton and Joshua Waldbeser

PlanAdviser magazine

July/August 2017

"IRA-to-IRA Transfers" Fred Reish and Joan Neri

White Paper

November 2017

"The Empower Retirement Best Interest Advice Program: Compliance with New Fiduciary Rules"
Fred Reish and Bruce Ashton

2016

PlanSponsor magazine

Column: Just Out of Reish, January 2016

"Quirky Quotes: Things People Wish They'd Never Written" Fred Reish, Bruce Ashton and Joshua Waldbeser

PlanAdviser magazine January/February 2016 "Revenue Sharing Payments" Fred Reish and Joan Neri

White Paper

February 2016

"Navigating Retirement Risks: Fiduciary Considerations" Fred Reish and Bruce Ashton

PlanSponsor magazine

Column: Just Out of Reish, February 2016

"Practical Considerations Brokerage" windows in 401(k) plans" Fred Reish, Bruce Ashton and Joshua Waldbeser

PlanSponsor magazine

Column: Just Out of Reish, March 2016

"Share Classes: Evaluating expense ratios and revenue sharing" Fred Reish, Bruce Ashton and Joshua Waldbeser

PlanAdviser magazine

March/April 2016

"Fiduciary Breaches By Others" Fred Reish and Joan Neri

Faegre Drinker Insights

April 14, 2016

"An Overview of the Fiduciary Rule" Fred Reish

PlanSponsor magazine

Column: Just Out of Reish, May 2016

"Allocation Differences: How Recaptured Revenue-Sharing Funds Can Be Used" Fred Reish

PlanAdviser magazine

May/June 2016

"Rollovers under the Fiduciary Rule" Fred Reish and Joan Neri

White Paper

June 2016

"Comprehensive Financial Planning in the Workplace: Fiduciary Solutions from Financial Engines"

Fred Reish and Bruce Ashton

PlanAdviser magazine

July/August 2016

"Referrals Under the Final Fiduciary Rule" Fred Reish and Joan Neri

White Paper

August 2016

"Reasonable Fees under the DOL's Conflict of Interest Guidance"

Fred Reish

White Paper

September 2016

"The Department of Labor's New Fiduciary Rule and Its Impact on Advisors" Fred Reish

White Paper

September 2016

"Managing Retirement Money: Using QDIAs and 3(38) Managers Effectively" Fred Reish

PlanAdviser magazine

September/October 2016

"Sweeping Changes in Advice" Fred Reish and Joan Neri

White Paper

October 2016

"A Blueprint Designed for Retirement Success" Fred Reish and Bruce Ashton

White Paper

November 2016

"Reasonable Fees: Who's Responsible?" Fred Reish and Bruce Ashton

PlanAdviser magazine November/December 2016 "Compensation"

Fred Reish and Joan Neri

White Paper

December 2016

"Recommending Rollovers: Information Requirements"

Fred Reish and Bruce Ashton

2015

LinkedIn article
January 2015
“Did you know...”
Fred Reish and Bruce Ashton

PlanSponsor magazine
Column: Just Out of Reish, January 2015 “Expense Recapture”
Fred Reish

LinkedIn article
February 2015
“Navigating Retirement Risks”
Fred Reish and Bruce Ashton

PlanSponsor magazine
Column: Just Out of Reish, February 2015 “Is 65 too Young to Retire?”
Fred Reish

PlanAdviser magazine
February 2015
“Managed Account 3(38)s”
Fred Reish and Joan Neri

LinkedIn article
February 2015
“Managing Defined Contribution Plan Investment Policy Statements”
Fred Reish

LinkedIn article
March 2015
“Did you know... About the Fiduciary Requirements for Selecting an Insurance Guarantee for your Participants?”
Fred Reish

PlanSponsor magazine
Column: Just Out of Reish, March 2015 “Questions of Class”
Fred Reish

LinkedIn article
March 2015
“The Fiduciary Exemption for Commissions” Fred Reish

LinkedIn article
April 2015
“What’s Hot... in the First Quarter of 2015?” Fred Reish

White Paper
April 2015

"Fiduciary Challenges for Evaluating Plan Fees: Investment Expenses and Revenue Sharing"
Fred Reish and Bruce Ashton

White Paper

April 2015

"Benchmarking Defined Contribution Plans: The Fiduciary Benchmarks, Inc. Methodology"

Fred Reish, Bruce Ashton and Summer Conley

Faegre Drinker Insights

May 2015

"Impact of the DOL's Fiduciary Proposal on Independent Registered Investment Advisers"

Fred Reish, Bruce Ashton, Bradford Campbell, Joan Neri and Joshua Waldbeser

LinkedIn article

May 2015

"The Essence of the Fiduciary Proposal... for Advisors" Fred Reish

PlanSponsor magazine

Column: Just Out of Reish, May 2015

"Allocating Plan Expenses" Fred Reish

PlanAdviser magazine

May 2015

"IRAs and ERISA"

Fred Reish and Joan Neri

LinkedIn article

May 2015

"Navigating Retirement Risks: Creating Sustainable Retirement Income" Fred Reish

White Paper

May 2015

"Navigating Retirement Risks: Creating Sustainable Retirement Income" Fred Reish and Bruce Ashton

Faegre Drinker Insights

June 2015

"The Impact of the DOL's Fiduciary Proposal on Sales of Insurance Products Fred Reish, Bruce Ashton, Bradford Campbell, Joan Neri and Joshua Waldbeser

LinkedIn article

June 2015

"Fiduciary Challenges for Evaluating Plan Fees: Investment Expenses and Revenue Sharing"

Fred Reish and Bruce Ashton

PlanSponsor magazine

Column: Just Out of Reish, June 2015 "Distributions and Rollovers"

Fred Reish

LinkedIn article

June 2015

"The Duty of Prudence and the Net Cost of Investments" Fred Reish and Bruce Ashton

White Paper

July 2015

"Educating Participants on Distribution Options: Plan Sponsor Considerations and the Empower Program"

Fred Reish and Josh Waldbeser

Faegre Drinker Insights

July 2015

"Impact of the DOL's Fiduciary Proposal on Participant Investment Advice" Fred Reish, Bruce Ashton, Bradford Campbell, Joan Neri and Joshua Waldbeser

PlanAdviser magazine

July 2015

"Advice to Plans and Participants" Fred Reish and Joan Neri

PlanSponsor magazine

Column: Just Out of Reish, July 2015 "The Meaning of Tibble"

Fred Reish

LinkedIn article

July 2015

"What was Hot in the Second Quarter of 2015?" Fred Reish

White Paper

July 2015

"Should Retiree Money Stay in A 401(k) Plan?" Fred Reish and Bruce Ashton

PlanAdviser magazine

August 2015

"Effects of the Fiduciary Rule: Questions Advisers are Asking" Fred Reish and Joan Neri

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¹ This list of articles that I have authored or co-authored is the result of a search of available materials. However, because of the large number of articles that I have authored or co-authored over the last 10 years, the list may inadvertently not include some articles. I will continue to search and, if I find additional articles, I will augment this list.

Articles from fredreish.com and brokerdealerlawblog.com
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TIPS for TPAs: MEPs: Compensating the Sponsor, Part II

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April 15, 2019

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November 8, 2016

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November 17, 2016

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"What About Rollovers that Aren't Recommended?"

November 29, 2016

"The Presidential Election: Now What?"

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"Capturing Rollovers: What Information is Needed?"

December 15, 2016

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February 3, 2015

Navigating Retirement Risks

February 10, 2015

Managing Defined Contribution Plan Investment Policy Statements

March 10, 2015

Did you know [About the Fiduciary Requirements for Selecting an Insurance Guarantee for your Participants?](#)

March 13, 2015

The Fiduciary Exemption for Commissions

April 28, 2015

What's Hot . . . in the First Quarter of 2015?

May 7, 2015

The Essence of the Fiduciary Proposal . . . for Advisors

May 4, 2015

Navigating Retirement Risks: Creating Sustainable Retirement Income

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Fiduciary Challenges for Evaluating Plan Fees: Investment Expenses and Revenue Sharing

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July 22, 2015

Impact of the DOL's Fiduciary Proposal on Participant Investment Advice

July 28, 2015

What Was Hot in the Second Quarter of 2015

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January 6, 2014

Investment Policy Statement: Friend or Enemy

March 5, 2014

Capturing Rollovers: A Changing Environment

April 17, 2014

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May 28, 2014

Advisory Opinion 2013-03A

July 16, 2014

DOL Proposed Guide

August 19, 2014

Providing Compliant Services

October 1, 2014

Re-Proposal of DOL Fiduciary Advice Regulation

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Aging Boomers and Rollovers to IRAs

December 17, 2014

ERISA Issues for Solicitor's Fees

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January 23, 2013

Plans With Only Brokerage Accounts

February 20, 2013

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March 11, 2013

The Benefits of Mandatory Distributions: A White Paper

March 21, 2013

Fiduciary Advice and 12b-1 Fees

April 25, 2013

Featured Member in The University of Arizona Newsletter

April 29, 2013

GAO Report on IRA Rollovers

May 14, 2013

Fiduciary Obligation to Select Appropriate Share Classes

June 12, 2013

Managing Plan Costs

July 16, 2013

Mass Mailing to Plan Sponsors About Excess Fund Fees

July 24, 2013

DOL Proposed Regulation Sent to OMB

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September 4, 2013

Responsible Plan Fiduciaries and Disclosure Issues

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Limiting the 401(k) Finder's Fee

October 7, 2013

Selection and Monitoring of Target Date Funds

November 20, 2013

Target Date Retirement Funds--Tips for ERISA Plan Fiduciaries

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Plan Brokerage Account

January 26, 2012

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February 16, 2012

What the 408(b)(2) Changes Mean to RIAs

March 19, 2012

Fiduciary Investment Advice for Participants

April 19, 2012

When are AAMs Considered DIAs?

April 30, 2012

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408(b)(2) Compliance

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Adequacy of Disclosures

June 20, 2012

408(b)(2) Disclosures for Related Parties

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408(b)(2) Disclosures and Referrals to Investment Managers

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Hedge Funds and Prohibited Transactions

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Field Assistance Bulletin Regarding 404a-5

August 20, 2012

408(b)(2) and Plan Sponsors

September 4, 2012

Asset Allocation Models

September 24, 2012

Disclosures for Individual Brokerage Accounts

October 18, 2012

408(b)(2) Violations and Service Provider Correction Program

November 26, 2012

Participant Disclosures about Brokerage Accounts

December 17, 2012

Brokerage Windows and Retirement Plans

² This list of articles that I have authored or co-authored is the result of a search of available materials. However, because of the large number of articles that I have authored or co-authored over the last 10 years, the list may inadvertently not include some articles. I will continue to search and, if I find additional articles, I will augment this list.

Exhibit 3

Information and Materials Considered

- Tax Reclaim Advisory Services Agreement Between Ganymede Cayman Limited and Michelle Investments Pension Plan Trust, WH_MDL_00219501
- Letter to David Zelman Re: Bareroot Capital Investments LLC Roth 401(k) Plan with documents – February 19, 2016, MBJ_0040346
- Bareroot Capital Investments LLC Roth 401(k) Plan Summary Plan Description, WH_MDL_00303907
- Table of Contents with Executed Documents for Bareroot Capital LLC Roth 401(k) Plan Certification of Trust, Operating Agreement, Certificate of Formation, IRS Employer Identification Number, Roth 401(k) Plan IRS Employer Identification Number, Roth 401(k) Plan W-9 Request for Taxpayer Identification Number and Certification, Roth 401(k) Plan Limited Power of Attorney, Roth 401(k) Plan, Formal Record of Action, WH_MDL_00028536
- Bareroot Capital Investments LLC Roth 401(k) Plan Application for United States Residency Certification, WH_MDL_00026778
- General Partnership Agreement of Bareroot Capital Investments General Partnership, WH_MDL_00029366
- Resolutions by Partners of Bareroot Capital Investments General Partnership, WH_MDL_00029362
- Letter to John H. Van Merkensteijn regarding 2016 U.S. Return of Partnership Income, 2016 New York Return of Partnership Income and 2016 New York City Return of Partnership Income, KF_MDL_14972
- 2015 Tax Return for Bareroot Capital Investments General Partnership Income, KF_MDL_14645
- 2014 Tax Return for Bareroot Capital Investments General Partnership Income, KF_MDL_13834
- Bareroot Capital Amended Complaint – April 20, 2020
- Plaintiff Skatteforvaltningen's Responses and Objections to Defendants' First Set of Interrogatories to Plaintiff Skatteforvaltningen, July 15, 2021
- Letter from the Internal Revenue Service to Broad Financial LLC – July 1, , WH_MDL_00169251
- RJM Capital Amended Complaint – April 21, 2020
- Deposition Transcript of Examination of Richard Markowitz – April 8, 2021

- Deposition Transcript of Examination of Richard Markowitz – April 9, 2021
- Form 5500s for RJM Capital LLC Pension Plan (2013, 2014, 2015 and 2016), SKAT_MDL_00002743, SKAT_MDL_00002741, SKAT_MDL_00356986, SKAT_MDL_00002745, WH_MDL_00356533, WH_MDL_00115436, WH_MDL_00356535, SKAT_MDL_00002747, WH_MDL_00356537
- Letter from IRS regarding Request for Information – May 22, 2018, WH_MDL_00356591
- Response to IRS' March 21, 2018 Request for Information - May 8, 2018, WH_MDL_00356182
- Response to IRS' May 22, 2018 Request for Information - June 26, 2018, WH_MDL_00356595
- Letter from IRS re Acceptance of Return - February 3, 2020, WH_MDL_00358607
- Response to IRS re Audit of RJM Capital LLC Pension Plan - April 9, 2019, WH_MDL_00358600
- Response to IRS re Audit of RJM Capital LLC Pension Plan - April 3, 2019, WH_MDL_00358598
- Response to IRS' February 4, 2019 Request for Documents - February 25, 2019, WH_MDL_00357011
- Response to IRS' September 13, 2018 Request for Documents - October 4, 2018, WH_MDL_00356990
- Trust Agreement under the RJM Capital Pension Plan, SKAT_MDL_00000346
- Certification of Trust, SKAT_MDL_00000391
- Application for United States Residency Certification, WH_MDL_00033719
- Limited Power of Attorney, WH_MDL_00096715
- The RJM Capital Pension Plan, WH_MDL_00331778
- The RJM Capital LLC Solo 401(k) Plan, WH_MDL_00356221
- State of Delaware Limited Liability Company Certificate of Formation, WH_MDL_00358608
- SKAT_MDL_001_00265426
- SKAT_MDL_00100413998
- Tax Reclaim Advisory Services Agreement, WH_MDL_00219501

- Cover letter of March 9, 2016 from Elite Pension Consultants to Roadcraft Technologies LLC, with enclosed copy of plan document, summary plan description, and IRS approval letter, WH_MDL_00139331.
- Roadcraft Technologies Amended Complaint – Apr. 21, 2020
- *In re Skat Tax Refund Scheme Litigation*, 356 F. Supp. 3d 300 (2019)
- American Investment Group of New York, L.P. Pension Plan – October 29, 2002, AIG_0000368
- American Investment Group of New York, L.P. Pension Plan – January 22, 2010, AIG_00000435
- Letter from Internal Revenue Service to American Investment Group of New York LP – January 14, 2003, ACER_00015174
- Internal Revenue Service, “Choosing a Retirement Plan: Profit-Sharing Plan,” *available at* <https://www.irs.gov/retirement-plans/choosing-a-retirement-plan-profit-sharing-plan>
- Internal Revenue Service, “One-Participant 401(k) Plans,” *available at* <https://www.irs.gov/retirement-plans/one-participant-401k-plans>
- Internal Revenue Service, “Retirement Topics – Prohibited Transactions,” *available at* <https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-prohibited-transactions>
- Internal Revenue Service, “EPCRS Overview,” *available at* <https://www.irs.gov/retirement-plans/epcrs-overview>
- Internal Revenue Service, “401(k) Resource Guide - Plan Sponsors - What if You are Audited?” *available at* <https://www.irs.gov/retirement-plans/plan-sponsor/401k-resource-guide-plan-sponsors-what-if-you-are-audited>